

WILLIAM J. LONG TURKEY  
v.  
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 00-29-A

Decided December 20, 2000

Appeal from an increase in the reservation minimum annual grazing rental rate on the Lower Brule Reservation.

Reversed. Fort Berthold Land and Livestock Association v. Aberdeen Area Director, 8 IBIA 90, 87 I.D. 201 (1980), disapproved in part.

1. Indians: Leases and Permits: Farming and Grazing--Indians: Leases and Permits: Rental Rates--Regulations: Generally

A clause authorizing reevaluation of a grazing rental rate which is inserted by a Bureau of Indian Affairs Superintendent or Regional Director into grazing permits with terms of five years or less is contrary to the regulations in 25 C.F.R. Part 166. Any such clause is therefore without force or effect.

APPEARANCES: William J. Long Turkey, pro se; Carrie Prokop, Esq., Office of the Field Solicitor, Ft. Snelling, Minnesota, for the Regional Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant William J. Long Turkey seeks review of a September 22, 1999, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), increasing the minimum annual grazing rental rate on the Lower Brule Reservation. For the reasons discussed below, the Board reverses the Regional Director's decision.

Background

Appellant holds grazing permit No. A15C14200033, covering Range Unit 33, on the Lower Brule Reservation. The permit has a term running from December 1, 1997, through November 30, 2002. The permit authorizes the year-long grazing of 305 head of cattle, and makes a grazing rental of \$10,158 due by December 1 of each year of the permit period. Although the basis of the rental is not clear from the permit itself, other materials before the

Board indicate that the annual rental was based on a charge of \$7.50 per AUM for allotted lands and \$3.00 per AUM for tribal lands. <sup>1/</sup>

On May 17, 1999, David M. Baker, a certified general appraiser in Rapid City, South Dakota, submitted to the Regional Director a grazing rate study for South Dakota for the 2000 grazing season. The study was based on the grazing rates paid by Farm Service Agency (FSA) stockmen for off-reservation grazing permits. <sup>2/</sup> Baker determined that there were 21 comparable off-reservation permits available in the data provided by FSA. He adjusted the information on those comparables slightly and determined that the annual rental rate for South Dakota reservations should be \$9.14 per AUM for the 2000 grazing season. This rate was an increase of \$1.64 per AUM from the previous rate of \$7.50 per AUM.

By memorandum dated September 22, 1999, the Regional Director informed the Superintendents of the reservations located wholly in the State of South Dakota, including Lower Brule, that she had established a minimum grazing rate for South Dakota of \$9.14 per AUM. <sup>3/</sup> The Lower Brule Superintendent notified permittees of the rental rate increase and of their right to appeal to the Board. Appellant filed a timely notice of appeal with the Board in accordance with the Superintendent's instructions.

The Board subsequently received eight other appeals relating to the Regional Director's increase in rental rates for the 2000 grazing season on reservations in North and South Dakota. One appeal concerned the Standing Rock Sioux Reservation. Appellants in that appeal also filed suit in federal district court, where a settlement was reached. The Board dismissed the appeal before it on the basis of the settlement. Claymore v. Great Plains Regional Director, 34 IBIA 213 (2000). The Board consolidated the remaining appeals. Opening and reply briefs

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<sup>1/</sup> AUM stands for animal unit month. The standard is the amount of forage consumed in one month by one cow with an unweaned calf at her side.

<sup>2/</sup> For ease of reading, the Board will use the term "permit" in referring to the document granting either on- or off-reservation grazing privileges, even though such privileges may be granted off-reservation through a "lease." It will similarly use the word "permittee."

<sup>3/</sup> 25 C.F.R. § 166.13(b) provides:

"The Area [now Regional] Director shall establish a reservation minimum acceptable grazing rental rate. The reservation minimum rate shall apply to all grazing privileges permitted on individually owned lands, to non-Indian owned livestock which allocated permittees may be authorized to graze on tribal lands, and to all tribal lands when the [tribal] governing body fails to establish a rate pursuant to paragraph (a) of this section. Except as otherwise provided in paragraph (c) of this section, the rate established shall provide a fair annual return to the land owners."

were filed by several of the appellants; other appellants relied on the information contained in their notices of appeal.

Although the Board had originally intended to issue one decision disposing of all of the appeals, it now finds that separate decisions should be issued because of factual differences among the various reservations. However, because consolidated briefs were filed with the expectation that all arguments raised by any appellant would be considered in the Board's decision, the Board will address relevant arguments made by an appellant in any of the appeals when it addresses a specific issue in this decision. It will not attempt to attribute each argument to the individual appellant(s) actually making that argument, but will instead treat the argument as if raised by the appellant here.

The Board has also received one appeal relating to an increase in the rental rate for the 2001 grazing season on the Rosebud Sioux Reservation. See Waln v. Great Plains Regional Director, 35 IBIA 283 (2000). <sup>4/</sup>

### Discussion and Conclusions

The question raised in this case is whether the Regional Director has authority to increase rental rates during the term of a five-year grazing permit.

The Regional Director argues that she has this authority because grazing permits in the Great Plains Region contain clauses which specifically authorize such adjustments. For example, Appellant's grazing permit, which is on a standard BIA permit form, contains typed-in Special Provision No. 6 which states: "Rental rates on allotted lands will be reviewed and adjustments made prior to the annual anniversary date, if warranted." Appellant's grazing permit is the only complete permit before the Board. Thus, the Board has no evidence as to the specific terms of other permits in the Region. However, because no appellant has disputed that such a clause appears in the permits, for purposes of this decision, the Board presumes that all grazing permits in the Great Plains Region contain Special Provision No. 6 or its equivalent.

The Regional Director states that the clause authorizing rental rate adjustments was inserted into all grazing permits in the Region because of the decision in Lakota Stockmen's Association v. Chase the Bear, Civil No. A1-83-88 (D.N.D. Jan. 17, 1985). In that case, the Association challenged the Department's setting of a new reservation minimum grazing rental rate for the Standing Rock Sioux Reservation. The new rate was to take effect on November 1,

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<sup>4/</sup> In addition to Claymore and Waln, related cases are: Cheyenne River Sioux Tribe v. Great Plains Regional Director, 35 IBIA 281 (2000); Lange v. Great Plains Regional Director, 35 IBIA 279 (2000); and Fort Berthold Land and Livestock Association v. Great Plains Regional Director, 35 IBIA 266 (2000).

1983, for permits having terms running from November 1, 1982, through October 31, 1987. The Standing Rock permits did not contain language authorizing rental rate adjustments during the permit term. The court stated:

Defendants concede the express language of the permits does not authorize a rate increase during the five year permit term. Defendants suggest that since the permits incorporate the general provisions of 25 C.F.R., Part 166, the BIA Area Director's authority to establish permit rates in the first instance encompasses the inherent authority to modify permit rates.

The only regulations specifically addressing modification of permit terms are 25 C.F.R. § 166.15(b), which applies only if there has been a violation of the permit or a withdrawal of allotted lands from trust administration, and 25 C.F.R. § 166.15(c), which applies when land is taken for "allocated Indian use or for grazing exempt from permit pursuant to § 166.8." Neither of those provisions applies in this case. Neither the express language of the grazing permits nor the language of 25 C.F.R. § 166.13(b) suggests that the authority to establish grazing rates encompasses the authority to unilaterally modify those rates during the term of the permit. This Court concludes that modification of permit terms, except as expressly defined in the regulations, is governed by principles of contract law. Defendants do not suggest that any of the recognized grounds for unilateral modification of contract terms applies. This Court therefore concludes that the authority to establish permit rates does not encompass an inherent authority to modify those rates and that the BIA Area Director was without authority to raise the grazing permit rate [during the term of the permits].

Slip Op. at 12-13. No appeal was taken from this decision.

The Regional Director contends at page 24 of her Answer Brief:

[The] practice since *Lakota Stockmen's Ass'n* has been to ensure that the permits **do** contain an explicit term which allows for adjustment of the grazing rate of the permit if the reservation minimum acceptable grazing rate for the affected reservation is adjusted, pursuant to § 166.13(b), during the life of the permit. Nothing in Part 166 or the U.S. Code prohibits such practice; nor is there any controlling case to the contrary. Indeed, such a practice is most protective of the interests of Indian landowners, while at the same time permittees have agreed upon execution of the permit to such an [adjustment]. This practice was explicitly recommended by the [Department of the Interior] Inspector General. *See Audit Report* ["Review of Lease Administration, Aberdeen Area Office, Bureau of Indian Affairs"], at 16 (Mar. 31, 1986) \* \* \*. [Footnote omitted.]

The grazing regulations have not been changed since the decision in Lakota Stockmen's Association, except for being moved from 25 C.F.R. Part 151 to Part 166. Thus, the Department accepted, or at least acquiesced in, the district court's conclusion that Part 166 does not authorize mid-term adjustments of rental rates for grazing permits with terms of five years or less. The question then becomes whether the Regional Director could authorize such adjustments by inserting a clause allowing mid-term rate adjustments into five-year grazing permits.

The Board has previously held that the parties can modify the terms of the BIA standard lease form to take special circumstances into account, and that BIA is bound by its approval of any such modification that is not inconsistent with the applicable regulations. See, e.g., Shoshone-Bannock Tribes v. Portland Area Director, 35 IBIA 242, 247 (2000) (a contractual provision which was approved by BIA and is consistent with the applicable regulation is binding on BIA); First Mesa Consolidated Villages v. Phoenix Area Director, 26 IBIA 18, 30 (1994) (BIA is bound by the terms of leases it has approved, when those terms are not in conflict with governing regulations); Smith v. Acting Billings Area Director, 17 IBIA 231, 235 n.7 (the use of a standard lease form "does not preclude the parties from adding, deleting, or altering provisions as necessary to reflect their agreement, so long as the alterations are not contrary to law").

The reverse of the Board's holding in cases such as those cited above is that BIA lacks authority to alter the standard lease form if the alteration is contrary to law and/or inconsistent with the regulations.

As the Regional Director notes, nothing in Part 166 explicitly prohibits mid-term rental rate adjustments for permits with terms of five years or less. However, neither does anything in the part explicitly authorize such adjustments. The only regulation which mentions rental rate adjustments is 25 C.F.R. § 166.14 which establishes the term of grazing permits. Subsection 166.14(a) provides that the maximum term of a grazing permit shall be "5 years except when substantial development or improvement is required, in which case the maximum period shall be 10 years." Subsection 166.14(c) states: "Permits for a period in excess of 5 years shall provide for review of the grazing fees by the Superintendent at the end of the first 5 years and for adjustment as necessary." Part 166 is otherwise silent as to adjustments of rental rates during the permit term. 5/

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5/ Proposed amendments to Part 166 were recently published at 65 Fed. Reg. 43874, 43934 (July 14, 2000). As proposed, section 166.409 would state in part:

"Is the grazing rate established by the BIA adjusted periodically?

"Yes. To ensure that Indian landowners are receiving the fair annual return, we may adjust the grazing rental rate established by the BIA, based upon an appropriate valuation

[1] After examining 25 C.F.R. Part 166 as a whole, the Board concludes that, in promulgating 25 C.F.R. § 166.14(c), the Department chose to authorize rental rate adjustments during the term of a grazing permit only for those permits with a term in excess of five years. Subsection 166.14(c) not only explicitly establishes the authority to reevaluate the rental rate for grazing permits with terms in excess of five years, but also implies that no such reevaluation is authorized for grazing permits with terms of five years or less. By not authorizing any adjustment to the rental rate of a permit with a term of five years or less, the regulations “create[] a justified expectation” that the rental rate for permits with terms of five years or less will not be adjusted during the permit term. Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 721 (8th Cir. 1979). The Board finds that a clause authorizing reevaluation of the rental rate which is inserted into grazing permits with terms of five years or less by a BIA Superintendent or Regional Director is contrary to the regulations and that any such clause is therefore without force or effect. The Board disapproves the decision in Fort Berthold Land and Livestock Association v. Aberdeen Area Director, 8 IBIA 90, 87 I.D. 201 (1980), to the extent that decision is inconsistent with the present decision.

The Board finds that it should address two additional matters raised by this appeal. The Regional Director contends that an argument that 25 C.F.R. § 166.4 precludes any additions to the standard grazing permit form is contrary to a long-standing interpretation of that section. The Regional Director’s contention implies that BIA has long interpreted section 166.4 to recognize not only BIA’s general authority to insert special terms and conditions into grazing permits, but also its authority to insert the rate adjustment provision at issue here.

Section 166.4 provides:

The grazing regulations of this part apply to individually owned, tribal, and Government lands under the jurisdiction of the Bureau of Indian Affairs, except as superseded by special written instructions from the Commissioner [of Indian Affairs] in particular instances, or by provisions of any tribal constitution, bylaws, or charter, heretofore duly ratified or approved, or by any tribal action authorized thereunder. All forms necessary to carry out the purpose of this part

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fn. 5 (continued)

method, taking into account the value of improvements made under the permit, unless the permit provides otherwise, following the Uniform Standards of Professional Appraisal Practice.

“(a) We will review the grazing rental rate prior to each anniversary date or when specified in the permit.

“(b) We will provide [the permittee] with written notice of any adjustment of the grazing rental rate 60 days prior to each anniversary date.”

65 Fed. Reg. at 43944.

shall be approved by the Commissioner. Grazing lands not in range units established under this part may be leased pursuant to part 162 of this chapter.

As discussed above, the Board has held that standard BIA lease and permit forms may be modified to suit the needs of the parties, as long as the alterations are not contrary to law or regulation. Thus, the Board agrees with the Regional Director to the extent she argues that section 166.4 does not prohibit the insertion of special provisions into grazing permits. However, the fact that special provisions are not precluded by section 166.4 does not mean that a provision contrary to the regulations may be inserted into a permit, no matter how longstanding BIA's practice of inserting such a provision into permits may have been.

The Regional Director notes that the Board has "previously taken 'administrative notice of the fact that significant changes to the condition of grazing lands can occur within a 5-year period.' *Keester v. Acting Aberdeen Area Director*, 20 IBIA 277, 279 (1991)." Regional Director's Answer Brief at 25. The Board made this observation in *Keester* in regard to physical changes in the condition of grazing lands, rather than changes in economic conditions. The possibility of economic changes during the term of a five-year permit was presumably taken into account in the promulgation of the regulations. By not authorizing rental rate adjustments for grazing permits with terms of five years or less, the Department appears to have chosen to allow the parties to have some stability in their relationship so that they could make plans based on known economic obligations. Obviously, the inability to adjust rental rates in years in which rental values have risen may result in landowners receiving less income than they could have if they had entered into a new permit that year. Just as obviously, the landowners will receive more income in those years in which rental values have decreased than they would have under a new permit.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Great Plains Regional Director's September 22, 1999, decision increasing the minimum grazing rental rate on the Lower Brule Reservation is reversed.

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Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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Anita Vogt  
Administrative Judge